

Memorandum

To: Rule 32 Task Force
From: Lacey Gard
Date: November 8, 2018
Re: Rules 32.1(c) & (h)

Currently pending before the Task Force is my proposal to modify Rule 32.1(h) by expressly limiting that Rule to death-penalty eligibility, Ms. Garcia's memorandum in opposition, and Mr. Steinfeld's compromise proposal. Separately pending is a proposal by Judge Eckerstrom to exempt Rule 32.1(c) from the preclusion rules, allowing a defendant to raise an illegal-sentence claim at any time.

Though Mr. Steinfeld's compromise is worth discussing, I propose another alternative that would address both the Rule 32.1(c) concerns and the Rule 32.1(h) concerns. I propose that the Task Force recommend all of the following: (1) the Rules be amended to exempt Rule 32.1(c) from preclusion; (2) Rule 32.1(c) be amended to excise the final clause ("or is not otherwise in accordance with the sentence authorized by law"), as discussed at the last Task Force meeting¹; (3) Rule 32.1(c) be amended to authorize eligibility-based challenges to death sentences; and (4) the death-penalty provisions be removed from Rule 32.1(h).

An eligibility-based challenge to a death sentence would fit neatly within Rule 32.1(c), and the removal of Rule 32.1(c)'s preclusion bar would ensure that a defendant could still raise a challenge to his or her death sentence at any time, as is currently permitted under Rule 32.1(h). The death-penalty provision could then be removed entirely from Rule 32.1(h) (where it is arguably misplaced), confining that Rule to claims of actual innocence of the criminal offense.

Below is a summary of the proposed changes to Rule 32.1:

¹ My proposal is contingent on the removal of Rule 32.1(c)'s final clause, as I am unwilling to agree to exempt the Rule as currently written from preclusion.

c) ~~a non-capital the sentence imposed exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law~~ or, in a capital case, the defendant presents clear and convincing evidence that no reasonable fact-finder would have found the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752;

....

(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, ~~or that the death penalty would not have been imposed.~~